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No. 87 - 1630

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

RELIANCE INSURANCE COMPANY,
Petitioner,

vs.

GLADOS, INC.,
a Florida corporation,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities . . . . . i-ii

Argument. 1-11

I. EVEN IF RAINEY v. BEECH AIRCRAFT CORPORATION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS, THE HOLDING SUB JUDICE DOES NOT.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S REJECTION OF PETITIONER'S "COOPERATION CLAUSE" DEFENSE.

Certificate of Service 12

TABLE OF AUTHORITIES

CASE CITATIONS PAGE(S)

Electron Mach. Corp. v. American Mercury Insurance Co.,
297 F.2d 212 (5th Cir. 1961). 10

Eliis v. International Playtex, Inc.,
745 F.2d 292, 301 (4th Cir. 1984) 7

Firemen's Fund Insurance Co. v. Boyd,
45 So.2d 499 (Fla. 1951). 10

Fraley v. Rickwell Int'l Corporation,
470 F.Supp. 1264, 1266 (S.D. Ohio 1979). 3

Haney v. Mizell Memorial Hospital,
744 F.2d 1467, 1473 (11th Circ. 1984). 5,6

John McShain, Inc. v. Cessna Aircraft Co.,
563 F.2d 632 (3rd Cir. 1977) 3

Kehm v. Proctor & Gamble Manufacturing Co.,
F.2d 613 (8th Cir. 1983). 7

Matthews v. Ashland Chemical, Inc.,
770 F.2d 1303, 1310 (5th Cir. 1985). 5

Miller v. Caterpillar Tractor Co.,
697 F.2d 141 (6th Cir. 1983). 3

National Merchandise v. United Serv. Auto Assn.,
400 So.2d 526 (Fla. 3rd DCA 1981). 10

Ojat v. State Farm Fire & Cas .Co.,
542 F.Supp. 1321 (W.D. Pa. 1982). 5

Owen v. Kerr-McGee Corp.,
698 F.2d 236, 239-40 (5th Cir. 1983). 5,6

Rainey v. Beech Aircraft Corp.,
784 F.2d 1523, 1528 (11th Cir.). 1,7

Smith v. Ithaca Corp.,
612 F.2d 215 (5th Cir. 1980). 1

U.S. v. Brown,
548 F.2d 1194 (5th Cir. 1977). 3

W.J. Kiely & Co. v. Bituminous Cas. Corp.,
145 So.2d 762 (Fla. 3rd DCA 1962). 10

STATUTES & RULES

Rule 17.1(a), U.S. Supreme Court Rule. 11

Rule 403, Federal Rules of Evidence. 6

Rule 404, Federal Rules of Evidence. 6

Rule 607, Federal Rules of Evidence. 6

Rule 608, Federal Rules of Evidence. 6

Rule 609, Federal Rules of Evidence. 6

POINTS FOR REVIEW

I. EVEN IF RAINEY v. BEECH AIRCRAFT CORPORATION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS, THE HOLDING SUB JUDICE DOES NOT.

The Eleventh Circuit Court of Appeals' holding below states:

> "We need not decide whether Detective Albritton's conclusion regarding the fire would be a 'factual finding' under a liberal reading of Fed. R. Civ. P. 803(8)(C)* because binding precedent in this circuit takes a restrictive approach to that hearsay exception. See Rainey v.Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir.) . . ."

And while it can be argued that Rainey, supra, and Smith v.Ithaca Corp., 612F.2d 215 (5th Cir. 1980) may clash with decisions of other federal circuits with regard to the breadth of Federal Rule of Evidence 803(8)(C)'s application to official reports, the decision of the Eleventh Circuit Court of Appeals sub judice certainly does not conflict with any federal appellate decisions cited by Petitioner at pages 36-37 of its petition.

A. The investigative report in question.

The court should first review Detective Allbritton's lengthy written report at Appendix pages 11-35. The following excerpts ought to be given special attention, because they contain opinions as to who caused the subject fire, hearsay and double hearsay:

At the first page (App. 11), William Addison, a principal

*The court obviously meant to refer to Federal Rule of Evidence 803(8)(C).

officer and general manager of Respondent/insured, is identified as the only suspect in this arson investigation. This is Allbritton's opinion on guilt.

At page 11 of the report (App. 20), Allbritton states that he was told by Coggan (a fire official), that Lacy (another fire official) overheard Gladys Addison (president of Respondent/insured) saying she had passed a polygraph test. This is double hearsay.

At page 13 of the report (App. 22), Allbritton states that he was told by Missy White (a former employee of Respondent/insured who testified at trial) that she suspected William Addison had intentionally set the subject fire. This is hearsay and an opinion on guilt.

At pages 14 and 15 of the report (App. 22 and 23), Paige Watson, (a former employee of Respondent/insured) is quoted as saying that the Addisons (principals of Respondent/insured) were "strange people" and that she had an opinion that William Addison set the subject fire. Ms. Watson is then quoted on statements she has heard first-hand and second-hand from other persons, regarding the Addisons and their restaurant business. This section contains hearsay, double hearsay, triple hearsay and opinions on guilt.

At page 18 of the report (App. 25), Sharon Taylor (a former employee of Respondent/insured) is quoted by Allbritton on her first-hand observations and also on what she has been told by others. This is hearsay and double hearsay.

At page 25 of the report (App. 31), quotes Kelsie Moore, a vending machine operator who placed machines at the Respondent/insured's restaurant, as not being "surprised" that the restaurant burned since business was so bad. This is

hearsay and also an opinion that Respondent/insured's principals burned their own business because they weren't making money.

Vince Cervera, a member of the band playing at Respondent/insured's restaurant the week of the fire, is quoted at pages 26-27 of Allbritton's report (App. 32-33) as having opinions that the Addisons were "weird" and that Mrs. Addison's morals were loose when she drank. Cervera is also quoted as saying that he'd been toldby others that Mrs. Addison was dating other men behind her husband's back. This section contains hearsay and double hearsay, and opinion about the believeabilty and character of the Addisons.

At the end of his report (App. 34-35), Allbritton says:

> "Writer does feel that there is great circumstanial evidence to indicate that Bill Addison did set fire to Glados Restaurant. However, there lacks enough evidence to support a charge and conviction in this matter. (Although in great amount, all evidence is circumstantial.)
>
> "This case will be considered exceptionally cleared as the conclusion of this investigation is that the owner Bill Addison did set fire to the restaurant, based on information listed throughout this report."

B. The investigative report is laced with hearsay

Rule 803(8)(C) simply permits introduction into evidence of factual findings set forth in an official, investigative report, without the necessity of have the fact-finder come into court and testify as to the facts he observed or the results of his testing. It does not create an open door through which all forms of hearsay set forth in the report itself can be admitted

into evidence at a civil trial. The principle was recognized in Miller v. Caterpillar Tractor Co., 697 F.2d 141 (6th Cir. 1983), wherein a police report was ruled inadmissible because it relied upon hearsay statements of witnesses. Similar rulings are found in U.S.v.Brown, 548 F.2d 1194 (5th Cir. 1977) and John McShain, Inc. v .Cessna Aircraft Co., 563 F.2d 632 (3rd Cir. 1977).

After stating that "one of the most controversial exceptions to the hearsay rule is section 'C' of Rule 803(8)," the court in Fraley v. Rockwell Int'l Corp., 470 F.Supp. 1264, 1266 (S.D. Ohio 1979) stated that "the declarant must have had first hand knowledge of the matter asserted."

In the instant action, the Allbritton report's "declarant" is Allbritton himself — not the persons he is quoting. The report is his out-of-court statement which is made admissible by Rule 803(8)(C). But Rule 803(8)(C does not obviate the problem of the hearsay within the report.

Petitioner's argument to the contrary, note (c) to exception (8) of Rule 803 of the Federal Rules of Evidence, of the Notes of Advisory Committee on Proposed Rules states:

> "Police reports have generally been excluded except to the extent to which they incorporate first hand observations of the officer." (Emphasis supplied.)

C. The investigative report is laced with opinions of guilt on the part of Respondent's principals and about their character.

Albritton's report contains express opinions of himself, Paige Watson, and Missy White that William Addison was guilty of intentionally burning Glados Restaurant. Kelsie

Moore is also quoted as saying she is not "surprised" that the restaurant burned, as it was doing such poor business, clearly implying that the Addisons arsoned the business.

Cervera and Watson are quoted as saying that the Addisons were "weird" or "strange" people, and that Mrs. Addison was dating other men behind her husband's back.

Had any of the above statements been solicited by Petitioner at trial through live appearance of these witnesses, the testimony would have been inadmissible.

1. Opinions about guilt of arson.

It is not proper to ask a witness a question which requires the witness to state a conclusion of law about legal responsibility for an accident which is at issue. Matthews v. Ashland Chemical, Inc., 770 F.2d 1303, 1310 (5th Cir. 1985). And while an arson investigator may, if qualified, express opinions on the cause of a fire, he cannot state whether or not someone has been charged with arson, nor can he state whether he possesses evidence which implicates the insured, when the insuror pleads arson as a defense. Ojat v. State Farm Fire & Cas. Co., 542 F.Supp. 1321 (W.D. Pa. 1982).

Despite Federal Rule of Evidence 704, which states:

> "[T]estimony in the form of opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact;"

this rule does not open the door to all opinions. The rule does not permit a witness to express legal conclusions. Haney v.Mizell Memorial Hospital, 744 F.2d 1467, 1473 (11th Cir.

1984). Or, as put another way in Owen v. Kerr-McGee Corp., 698 F.2d 236, 239-40 (5th Cir. 1983):

> "The Advisory Committee notes make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions." 698 F.2d at 240.

And footnote 8 of the Haney decision also notes:

> "The abolition of the ultimate issue rule does not lower the bars as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for the exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach." 744 F.2d at 1474.

2. Opinions about character of the Addisons:

Federal Rule of Evidence 404 provides that evidence of a person's characters is not admissible in a civil action, except as allowed under Rules 607, 608 and 609.

Since "impeachment by evidence of conviction of crime" is not involved sub judice, it is only Rule 608 which needs be addressed. And under Rule 608, evidence of a witness' character may only relate to his/her "character for truthfulness or untruthfulness." How could evidence of the Addisons' being "weird", "strange" or lacking in sexual fidelity relate to their "character for truthfulness or untruthfulness ?"

The trial judge sub judice certainly did not find such evidence to be probative.

D. Rule 803 (8) (C) does not Convert all Inadmissible Testimony into Admissible Evidence

Caselaw cited by Petitioner at pages 36-37 of its Appendix bears careful review to understand just how limited the scope of Rule 803(8)(C) is. The rule does not suddenly convert inadmissible evidence into admissible evidence by including the testimony in a government agency report. The rule only removes a hearsay objection to the failure of the report's author to appear and give live testimony as to his factual findings.

1. Rule 803 (8) (C) is limited to "factual findings" based upon highly reliable data.

In his special concurrence in Rainey v. Beech Aircraft Corp., 784 F.2d 1523 (11th Cir. 1986), Judge Johnson felt that the 11th Circuit's restrictive application of Rule 803(8)(C) was an "anomaly" among the Circuit Courts of Appeal, and mentioned the decision in Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984), as an example of the majority view, allowing certain types of opinions in government reports to be admitted into evidence under Rule 803(8)(C).

But the Ellis case involved a toxic shock syndrome claim. The plaintiff there sought to introduce into evidence a report from the U.S. Center for Disease Control which contained scientific studies resulting in both "statistical findings" and "tentative conclusions." The Ellis court found that the CDC report was based upon reliable data from an unbiased source. A similar holding was made in Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983), also a toxic shock syndrome case.

Both the Ellis and Kehm decisions are cited in Petitioner's Appendix as decisions conflicting with the holding sub judice, but there is a major difference between scientific conclusions reached by researchers, based upon empirical data, and a sheriff's investigator's opinion that Mr. Addison is guilty of arson because his bookkeeper says so!

2. The "factual findings" in a report should be be made by an unbiased fact-finder.

Petitioners attempted to bootstrap into evidence testimony which was highly prejudicial, unreliable, and lacked probative value, by arguing that it was part of a "factual finding" set forth in a government agency's investigative report.

As noted at page 7 of the petition filed herein, the Advisory Committee Notes on Rule 803(8)(C) contained four factors to be considered when determining a government report's "trustworthiness." Included in these four factors was a question as to "whether a hearing was held on the level at which conducted."

Reviewing the federal circuit decisions cited by petitioner at pages 36-37 of its petition, this court can see that those not relating to reports based on scientific data (blood tests, toxic shock syndrome, vehicle stopping distances, etc.) were decisions allowing admission into evidence of reports from agencies following administrative hearings (EEOC, maritime, FAA, etc.), where both sides on an issue have presented their cases to an unbiased fact-finder.

But there was no administrative hearing prior to issuance of the Albritton report, nor was a disinterested fact-finder charged responsible for reaching the conclusion at the end of the report. In short, Albritton's report is his opinion, based

upon the opinions of people who didn't like the Addisons.

E. Conclusion on the Albritton Report

Rule 803(8)(C) of the Federal Evidence Code will not convert inadmissible opinion evidence, character evidence, or double hearsay, into admissible evidence, simply because objectionable evidence is recorded in the body of a criminal investigator's report.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S REJECTION OF PETITIONER'S "COOPERATION CLAUSE" DEFENSE.

A. Factual basis for the lower courts' rulings

Review of the decision of the Eleventh Circuit Court of Appeals below (Appendix p. 7) addresses the "cooperation clause" defense raised by petitioner succinctly:

> "RELIANCE concedes that the Addisons complied with the requests that they allow it to examine the corporate documents and records for Glados. It contends, however, that because Glados was wholly owned by Gladys Addison, the personal financial records of the Addisons were highly relevant to Reliance's arson defense and were covered by the cooperation clause. We disagree. The insurance policy is between RELIANCE and GLADOS, INC., a corporation. The language of the cooperation clause is unambiguous, and requires only the 'Named Insured' to provide relevant documents to RELIANCE. Under the terms of this policy, we cannot conclude that the Addisons were obligated to provide their personal records."

There is no question that GLADOS, INC. provided every document requested from it by petitioner under the cooperation clause. Petitioner only complains that the Addisons refused to voluntarily provide their personal financial records.

B. Florida Law Regarding Policy Defenses

Petitioner's "cooperation clause" defense is one based entirely upon the contract between petitioner and its insured and, as such, is an affirmative defense under the insuror's policy. The burden of proof is upon the insuror and the insured is not required to prove compliance as a prerequisite to recovery of policy proceeds. W.J.Kiely & Co. v. Bituminous Cas. Corp., 145 So.2d 762 (Fla. 3rd DCA 1962).

Under Florida law, any ambiguity existing in an insurance policy will be construed in the light most favorable to the insured. National Merchandise v. United Serv. Auto Assn., 400 So.2d 526 (Fla. 3rd DCA 1981; Fireman's Fund Insurance Co. v. Boyd, 45 So.2d 499 (Fla. 1951). And where there is no ambiguity, language used in the policy will control. Electron Mach. Corp. v. American Mercury Ins. Co., 297 F.2d 212 (5th Cir. 1961).

As noted by the Eleventh Circuit Court of Appeals in its remarks quoted above, there was nothing ambiguous about the "cooperation clause" in petitioner's policy. It simply provided that the "Named Insured" produce its records — not anyone else's records.

C. Petitioner's Burden with regard to its "cooperation clause" defense.

Under Rule 17.1(a) of the the U.S. Supreme Court Rules, this court will not grant a review on a writ of certiorari on an

issue of purely state law unless a federal court of appeals "has decided a federal question in a way in conflict with a state court of last resort."

This court should carefully review the authorities cited by petitioner in its second point for review, as this will reveal not one decision from any jurisdiction which has denied a corporate insured fire coverage because its principals refused to voluntarily produce their personal financial records demanded by the corporation's insuror.

In each case cited by petitioner, from Florida or otherwise, it has been the named insured that has refused production of its own financial records.

Because petitioner clearly cannot establish that the lower court's opinion directly conflicts with an opinion of the Florida Supreme Court (Florida's court of last resort), this court should summarily deny review on writ of certiorari on petitioner's "cooperation clause" defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished by U.S. Mail to W. Lane Neilson, Esquire, NEILSON & ASSOCIATES, 135 W. Central Boulevard, Suite 200, Orlando, FL 32801 on this 14 day of ~~March~~ APRIL, 1988.

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